Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Partial Reconsideration	)	
and Clarification of the InterCall	)	
Order of Global Conference Partners	)	
	)	CC Docket No. 96-45
Petition for Reconsideration of	)	
A+ Conferencing, Ltd., Free	)	
Conferencing Corporation, and	)	
The Conference Group	)	

COMMENTS OF CISCO SYSTEMS, INC.

Cisco Systems, Inc. ("Cisco") supports the Commission's determination that the "audio bridging services offered by InterCall are 'toll teleconferencing services' and that InterCall must contribute directly to the universal service fund ... based on revenues from these services."[1] Cisco believes that the *Intercall Order* simply confirms that services like Intercall's audio bridging that share the same fundamental character as traditional telecommunications are subject to the same regulatory obligations as traditional telecommunications. Cisco recognizes, however, that certain language could be misread by some to suggest that – instead of being the straightforward application of existing precedent – the *InterCall Order* quietly but fundamentally alters the Commission's approach to information services that include telecommunications components. Cisco thinks it is self-evident that the Commission did not intend in the context of an individual proceeding to rewrite its long-standing rules on information services. Accordingly, to

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[1] *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10731, 10731 (2008) ("*InterCall Order*").

alleviate any possible confusion, the Commission should make clear that it did not, in fact, use this proceeding to rewrite its rules.

I. The Commission Correctly Held that Revenue from Audio Teleconferencing Services Is Telecommunications Revenue.

The *InterCall Order* straightforwardly holds that "audio bridging services provided by InterCall are telecommunications."[2] As described in the order, InterCall's audio bridging service[3] allows users to dial into an audio bridge to connect to a conference call and transmit voice without change in form or content over telephone lines.[4] The Commission recognized that the function of InterCall's audio bridge is "simply to facilitate the routing of ordinary telephone calls."[5] As a result, the Commission held, the core of Intercall's service is the "'creation of [a] transmission channel chosen by the customer.'"[6]

With this understanding of Intercall's service, the Commission applied its functional integration test to determine whether additional features of InterCall's service

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2 *InterCall Order* ¶ 7.

3 The *InterCall Order* characterizes InterCall's services as audio, web and video conferencing service, citing the InterCall Request for Review at 4. The reference by InterCall at page 4 to services other than audio conferencing, however, is a reference not to InterCall's services but to services offered by the "conferencing services industry as a whole." Request for Review by InterCall, Inc., of Decision of the Universal Service Administrator, CC Docket No. 96-45, at 4 (filed Feb. 1, 2008) ("InterCall Request for Review"). The *InterCall Order* nowhere suggests that it reaches web-based or video conferencing services, and InterCall's description of the services at issue does not support this reading. Because the *InterCall Order* cannot be read to reach any conferencing service other than audio conferencing, Cisco sees no need for clarification on this point.

4 *Id.* ¶ 11.

5 *Id.*

6 *Id.* (quoting *North American Telecommunications Association Petition for Declaratory Ruling Under § 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, ENF 84-2, Memorandum Opinion and Order, 101 FCC 2d 349, 363 ¶ 31 (1985) ("*NATA Order*")).

converted InterCall's audio bridging service into an information service.[7] The Commission concluded that the additional features InterCall offers with its audio bridging service (including muting, recording, erasing, and accessing operator services) "do not alter the fundamental character of InterCall's telecommunications offering so that the entire offering becomes an information service."[8] Having determined that InterCall offers a service that "results in 'no more than the creation of the transmission channel chosen by the customer'"[9] and that additional features offered by InterCall do not alter the "fundamental character"[10] of InterCall's service, the Commission's determination that InterCall offers telecommunications and must contribute to USF is plainly correct. Indeed, many providers, including Verizon,[11] AT&T,[12] and Cisco's subsidiary WebEx have been contributing to USF on the basis of their provision of audio conferencing services that are functionally indistinguishable from those offered by InterCall.

II. The *InterCall Order* Did Not Modify Existing Law.

While the outcome and holding of the *InterCall Order* is correct, certain language in the *Order* could be misread to suggest, contrary to Supreme Court and Commission precedent, that merely enabling consumers to use a service "with or without accessing" certain features is sufficient to convert an information service into a telecommunications

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7 *Id.* ¶ 12 n.33.

8 *Id.* ¶ 13.

9 *Id.* ¶ 11 (quoting *NATA Order*).

10 *Id.* ¶ 13.

11 *See* Opposition of Verizon, InterCall, Inc., Appeal of Decision of the Universal Service Administrative Company and Request for Waiver, CC Docket No. 96-45, at 5, 6 (filed Feb. 25, 2008).

12 *See* Comments of AT&T, InterCall, Inc., Appeal of Decision of the Universal Service Administrative Company and Request for Waiver, CC Docket No. 96-45, at 2 (filed Feb. 25, 2008).

service.[13] While we think it clear that the Commission did not *sub silentio* narrow or modify its long-standing tests for whether a service is functionally integrated and "alter[s] the fundamental character of [a] telecommunications offering,"[14] the Commission would do well to re-emphasize that it was merely applying existing law, not rewriting it.

Distinguishing between an information service and a telecommunications service is a task that is no longer new – but it remains a task that is not always simple, as the Supreme Court and the Commission have each explained. In the words of the Commission, as cited by the Court, "the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service."[15] The Commission has consistently made this point, recognizing in its *Prepaid Calling Card Order* that the information service/telecommunications service determination "may be difficult."[16] As the Court has further explained, this difficult question "turns . . . on the factual particulars of how Internet technology works and how it is provided."[17] This fact-based inquiry cannot be reduced to a single "factual particular" – such as whether the service can be used with or without accessing information service features – in all (or even most) cases.

The touchstone for distinguishing between information and telecommunications services is perhaps the *Cable Modem Order* where the Commission reiterated its conclusion that "Internet access service is appropriately classified as an information

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13 *InterCall Order* ¶ 13.
14 *Id.*
15 *NCTA v. Brand X Internet Services*, 545 U.S. 967, 991 (2005) ("*Brand X*").
16 *Regulation of Prepaid Calling Card Services,* Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006) ("*Prepaid Calling Card Order*").
17 *Brand X,* 545 U.S. at 991.

service, because the provider offers a single, integrated service, Internet access, to the subscriber."[18] This Order expressly precludes any test that turns solely on the freedom to use a service "with or without accessing" information service features.

In the *Cable Modem Order* the Commission cited several examples of information service functions "typically include[d]" in Internet access service: "[e]mail, newsgroups, the ability...to create a web page...and the DNS."[19] The Commission specifically considered whether these functions must be offered or used in all cases and rejected such an inflexible test. Instead, the Commission explained, "cable modem service ... is an information service ... ***regardless of whether subscribers use all of the functions provided as part of the service***, such as email or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service."[20]

As the Commission knows, users can use cable modem or other Internet access services without using any of the key functions the Commission cited as bases for its information service classification. Users often choose to use Internet access service without taking advantage of email, newsgroups, or web page creation functions. While it is less common to use Internet access without accessing DNS services, it is not impossible or impractical to do so, and sophisticated users in particular may have reasons to use a DNS service other than the DNS bundled with their Internet access. In other words, if the key to the information service/telecommunications service distinction were

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[18] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4821 ¶ 36 (2002) ("*Cable Modem Order*") (citing 47 U.S.C. § 153(20)).

[19] *Id.* ¶ 37, 38.

[20] *Id.* ¶ 38 (emphasis added).

whether a service permits users to use the service "with or without accessing" information service features, Internet access service would be a telecommunications service. But, of course, it is not.

After wrestling with the information service/telecommunications service distinction for more than a decade, the Commission has a significant body of precedent on which it and others can rely – and have relied. Cisco does not understand the "with or without accessing" language in Paragraph 13 of the *Intercall Order*, properly read, to dispense with this body of precedent, or to suggest that a service that "functionally integrates" telecommunications and information service could be classified as telecommunications simply because that service can be used "with or without accessing" information service functions. Indeed, the Commission's inclusion of this language in its *Order* on InterCall's Request for Review, and not as part of a broader rulemaking proceeding, indicates that the Commission saw its decision as nothing more than a routine application of existing law. Nevertheless, to avoid confusion, the Commission should confirm that its *InterCall Order* simply applies the Commission's existing precedents to the facts presented by InterCall and does not call into question the information service classification of services that are functionally integrated, even if those services may be used "with or without accessing" information service functions.

III. A "With or Without Accessing" Test Would Be Unworkable and Would Drive Innovation off the PSTN.

Cisco is convinced that the Commission had no intention in the *InterCall Order* of changing its approach to the distinction between information and telecommunications services. Nor do we think it even intended to open a debate about that approach. Nevertheless, Cisco believes it worth pointing out that sound policy counsels leaving the

current approach unaltered. Treating as telecommunications services those integrated services that permit consumers to use them "without accessing" the information service features of those services would create a nightmare of confusion about the appropriate regulatory classification of a wide range of existing and emerging services. This treatment would also chill the offering of PSTN voice services in conjunction with information service applications and other non-telecommunications services.

There are good reasons for service providers to permit new services to work seamlessly with the PSTN. Integrating new services with the PSTN increases the availability and accessibility of those services. Moreover, such services have the potential to increase broadband deployment and adoption by increasing awareness of and demand for services that provide more than traditional telecommunications service. As the world of communications increasingly converges, the Commission should enable, not discourage, new services that work across networks and fundamentally alter how we communicate.

Web-based collaboration services provide perhaps the clearest example of services that accommodate PSTN-only users of a service that otherwise fundamentally alter the nature of communications. Many services, including an information service offered by WebEx, permit users to convene online meetings during which users may share documents and desktops, make notes, edit and redline, make multi-media presentations, and stream audio and video. Participants in these online collaborations can communicate using non-interconnected VoIP or the PSTN. These services, even when they integrate users on the PSTN, bear no resemblance to traditional audio conference calls.

Online collaboration and meeting services, however, typically permit users to participate without engaging in the web-based collaboration. The need for this flexibility is obvious – in a business setting, in particular, one or more participants in any collaboration is likely to be calling in from a car, an airport, a conference, a client, or the field. In today's competitive environment, any service that did not accommodate these users would be quickly discarded in favor of one that did.

But the list of potentially affected services does not end here. As noted above, if the Commission adopted a "with or without accessing test" the regulatory status of Internet access services themselves would necessarily be called into question. A whole range of non-traditional services that combine transmission with information service features could similarly be affected. Any online voice communication or data transmission, such as web-based help lines or audio-enabled social networking that permits a connection to the PSTN, that is flexible enough to allow some incidental use of the service without engaging some or all information service features, could be affected. Emerging services in particular would be discouraged from enabling PSTN compatibility, locking consumers without broadband access out of entire new modes of communicating. Such an outcome, of course, would undermine Congress's express policy to "encourage the deployment ... of advanced telecommunications capability"[21] and "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[22]

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[21] 47 U.S.C. § 157 nt.
[22] 47 U.S.C. § 230(b)(2).

Conclusion

It is unthinkable that, in holding that Intercall's audio conferencing services are "telecommunications," the Commission intended to undo a decade of precedent distinguishing information services and telecommunications services. Rather, the *Intercall Order* simply applied existing law to what is in reality a traditional toll teleconferencing service. Nevertheless, there appears to be some confusion in the communications community about the meaning of this holding. Accordingly, the Commission should make clear that it did not intend to modify existing law and precedent, and dismiss the petitions for reconsideration. This step will both protect universal service and ensure that the imagination of innovators and the needs of consumers – not the limits of regulatory lawyers – will continue to shape America's communications future.

Respectfully submitted,

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